No. 20331

# United States
# COURT OF APPEALS
## for the Ninth Circuit

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, a voluntary unincorporated association, T. M. DELANEY, individually and as General Chairman, LEO HOLZACHUH, EARL A. JONES, E. O. BUDAHL, and M. H. MEISTRELL, individually and as Local Chairman,

*Defendants-Appellants,*

v.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington corporation, OREGON TRUNK RAILWAY, a Washington corporation, and OREGON ELECTRIC RAILWAY COMPANY, an Oregon corporation,

*Plaintiffs-Appellees.*

*Appeal from the United States District Court for the District of Oregon*

## BRIEF FOR APPELLANTS' ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ET AL

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### STATEMENT OF BASIS OF JURISDICTION

This is an appeal from a preliminary injunction enjoining a labor organization from conducting a threatened strike (R. 116-117). This court has jurisdiction by virtue of 28 U.S.C. 1292(1). The district court based its decision on the ground that the dispute over which a strike was threatened was a minor dispute under the provisions of the Railway Labor Act, as

amended (45 U.S.C. 151 et seq.), and as such was properly referrable to an adjustment board under Section 3 of that Act (R. 115). The labor organization contends that the dispute over which the strike was threatened was a major dispute as to which a strike was completely proper and lawful and hence jurisdiction to issue the injunction was removed by the Norris-La Guardia Act, 29 U.S.C. 101 et seq. (R. 35-43).

## STATEMENT OF THE CASE

### The Pleadings

The complaint was filed on June 4, 1965 by the Spokane, Portland & Seattle Railway Company and its two wholly-owned subsidiaries, Oregon Trunk Railway and Oregon Electric Railway Company (R. 1-2). These three corporations enter into collective bargaining agreements as a common entity known as the "SP&S Railway Company System Lines" (R. 2) and will be hereinafter referred to as SP&S.

The defendants named in the complaint are a labor organization, the Order of Railway Conductors and Brakemen, and six officers of that organization (R. 3). The Order of Railway Conductors and Brakemen is and at all times here material has been the duly recognized representative for purposes of collective bargaining of the classes and crafts of employees of the SP&S known as conductors and brakemen (R. 3) and will be hereinafter referred to as ORC&B.

The complaint alleged that rates of pay, rules and

working conditions of conductors and brakemen are governed by the provisions of collective bargaining agreements and amendments thereto (R. 4). The complaint quotes at length the pertinent provisions of several agreements which are alleged to govern the matter of accommodations for crews away from home (R. 4-6), asserts that the carriers have complied fully with all their agreements, including these (R. 4-8), but that a dispute has as to whether the accommodations the carriers propose to furnish are suitable or the allowance in lieu thereof is equitable (R. 7). The complaint attaches as Exhibit D (R. 21) a notice dated August 3, 1964, served by the ORC&B upon SP&S under Section 6 of the Railway Labor Act in which ORC&B proposed that SP&S agree to provide the following:

> "(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood or carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.
>
> "(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth mile from point where crews are required to register on and/or off duty, or suitable transportation furnished between lodging and points of reporting for duty or going off duty. Call service will be provided by carrier.
>
> "(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance per trip will be sir dollars ($6.00) to be paid by check separate and apart from wages and earnings."

The complaint alleges that ORC&B on November 12, 1964, invoked the mediatory procedures of the National Mediation Board as provided by Section 6 of the Railway Labor Act, in support of its efforts to secure agreement to the above quoted proposal, that on the same date the National Mediation Board advised SP&S of this action and requested a statement from the carriers with respect to "Organization's Section 6 notice of August 3, 1964, requesting adoption of certain rules governing lodging facilities," and that SP&S on November 16, 1964 replied to the National Mediation Board requesting that the National Mediation Board reject the organization's application for its mediatory services (R. 8, 18-20).

The complaint further alleges that on June 3, 1965, the ORC&B gave notice to the National Mediation Board of a strike scheduled for June 7, 1965 to secure adoption of the above quoted proposal of August 3, 1965 (R. 9), and that SP&S, by letter dated June 3, 1965 filed an ex parte submission with the SP&S-ORC&B Special Board No. 434 of the following claim (R. 9, 22):

> "That the arrangements made by the Management of the Spokane, Portland and Seattle Railway Company as described in Superintendent's Circular No. 65, dated July 24, 1964, effectively discharge this Carrier's obligation under Section 1, Article II, 'Expenses Away From Home,' of the National June 25, 1964 Agreement between the railroads of the nation generally and the operating labor organizations."

The complaint prayed that the court enjoin the foregoing threatened strike as over a minor dispute (R. 13-14).

On June 4, 1965, the court below, without notice to the defendants, issued a temporary restraining order enjoining the strike (R. 31-34).

In their answer the defendants asserted that the complaint shows on its face that the dispute, as to which a strike is threatened, concerns a proposed change in the existing collectively bargained agreements based upon a proper notice from the ORC&B to the carriers in accordance with the provisions of Section 6 of the Railway Labor Act (R. 35-36), that this court lacks jurisdiction of the subject matter because this dispute is a labor dispute within the meaning of the Norris-La Guardia Act, 29 U.S.C. 101, 104, 108 and 113 and a major dispute within the meaning of the Railway Labor Act rather than a minor dispute (R. 36), that the SP&S-ORC&B Special Board No. 434 has no jurisdiction to entertain the dispute which SP&S attempted to submit to it (R. 38), that by its notice of August 3, 1964 ORC&B proposes to amend the existing collectively bargained agreements between SP&S and ORC&B so as to require SP&S to provide the specifically described lodging conditions away from home or an allowance of $6.00 per trip in lieu thereof (R. 39-40), that in the absence of mediation under the auspices of the National Mediation Board the defendants are free to call a strike in support of their Section 6 Notice (R. 42) and that the Circular No. 65 issued by the SP&S on July 24, 1964 was not preceded by any negotiation with ORC&B and was not agreed to by the defendants but was issued entirely unilaterally by SP&S (R. 42).

On July 3, 1965 the SP&S filed a supplemental complaint alleging that on the same date the plaintiffs have filed an ex parte submission before the First Division of the National Railroad Adjustment Board (R. 54), a copy of which submission was attached (R. 56-98) and showed the attempted submission to the NRAB, First Division of the same claim theretofore submitted to Special Board No. 434, namely the following claim (R. 56):

> "That the arrangements made by the management of the Spokane, Portland and Seattle Railway Company as described in Superintendent's Circular No. 65 dated July 24, 1964 (Carrier's Exhibit 'A') effectively discharge this Carrier's obligation under Section 1, Article II—'Expenses Away from Home' of the National June 25, 1964 Agreement between the Railroads of the nation generally and the operating labor organizations."

## The Hearing

The court below conducted a hearing upon the motion for preliminary injunction during the course of which it received in evidence copies of all the pertinent agreements, correspondence and government reports (Tr. 5-6) and heard argument of counsel.

## Findings of Fact

The court below made extensive findings of fact, which amounted in most part to a restatement of the allegations of the complaint as findings of fact plus a chronological setting forth of the exhibits introduced in evidence (A. 100-115).

### Conclusions of Law

The court below concluded that "The dispute between plaintiffs and defendant ORC&B is a minor dispute under the provisions of the Railway Labor Act, as amended (45 U.S.C. Section 151 et seq.), and as such is properly referable to an appropriate tribunal under Section 3 of that Act for adjudication of such disputes, in the event the parties are unable to reach agreement thereon," that "A strike by defendant ORC&B to compel agreement on said disputes is unlawful and enjoinable" and that "Plaintiffs are entitled to a temporary injunction in this cause restraining and preventing defendants from striking or otherwise interfering with plaintiffs' operations over the interpretation or application of Article II, Section 1, of the agreement of June 25, 1964, until the final order of this Court" (R. 115).

### The Temporary Injunction

On August 3, 1965, the court below issued a temporary injunction enjoining and restraining the defendants until further order of the court from conducting or permitting any strike or work stoppage on the SP&S (R. 116-118).

## SPECIFICATION OF ERRORS RELIED UPON

1. The court below erred in determining that the threatened strike was for the purpose of compelling agreement with respect to a minor dispute.

2. The court below erred in determining that the threatened strike was for the purpose of compelling agreement with respect to any dispute which was properly referable to any tribunal under Section 3 of the Railway Labor Act.

3. The court below erred in determining that the strike here threatened was unlawful and enjoinable.

4. The court below erred in failing to determine that the threatened strike was for the purpose of securing agreement of the SP&S to amend its prior agreements to provide for the type of lodging and allowance proposed by ORC&B in its notice of August 3, 1964.

5. The court below erred in failing to determine that the notice of ORC&B dated August 3, 1964 was a proper notice of ORC&B dated August 3, 1964 was a proper notice under Section 6 of the Railway Labor Act, 45 U.S.C. 156.

6. The court below erred in holding that it had jurisdiction to enjoin a strike because the Norris-La Guardia Act, 29 U.S.C. 101 et seq. removed all such jurisdiction from the court below.

7. The court below erred in failing to hold that the threatened strike presented a labor dispute within the meaning of the Norris-La Guardia Act, 29 U.S.C. 101 et seq.

8. The court below erred in finding (R. 102-103) that the plaintiffs had duly performed all the terms and conditions contained in each agreement on their part to be performed and are ready, willing, and able to continue to do so, whereas the National Agreement of June 25,

1964 imposed upon the plaintiffs the duty to negotiate on a local basis with respect what constitutes suitable lodging or equitable allowance in lieu thereof but plaintiffs have at all times refused to so negotiate and instead promulgated unilaterally their own declaration of what they will provide as lodging or allowance in lieu thereof.

9. The court below erred in issuing the temporary injunction.

## ARGUMENT

### I

### The Norris-La Guardia Act, 29 U.S.C. 101, et seq., deprived the court of jurisdiction to enjoin the strike here involved.

#### A

#### The labor dispute with respect to which the ORC&B threatened to strike is not the same labor dispute as the one which SP&S attempted to submit to the adjustment boards.

The court below erroneously assumed that only one labor dispute was here involved. The labor dispute which SP&S attempted to submit first to SP&S-ORC&B Special Board No. 424 (R. 22), and then to the National Railroad Adjustment Board, First Division (R. 56), is defined by the claim set forth by SP&S in its submissions. The claim set forth in each submission is identical and reads as follows:

> "That the arrangements made by the Management of the Spokane, Portland and Seattle Railway Company as described in Superintendent's Circular

No. 65, dated July 24, 1964, effectively discharge this Carrier's obligation under Section 1, Article II, 'Expenses Away From Home,' of the National June 25, 1964 Agreement between the railroads of the nation generally and the operating labor organizations."

The pertinent provisions of the National Work Rules Agreement of June 25, 1964, to which the claim has reference when it speaks of "National June 25, 1964 Agreement," are as follows (R. 44).

"Article II—Expenses Away From Home:

"Section I—

"When the carrier ties up a road service crew (except short turnaround passenger crews) or individual members thereof, at a terminal (including tieup points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. *Suitable lodging* or an equitable allowance in lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.

"If an allowance is being made in lieu of lodging as well as other considerations under provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

"The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement.

* * * * *

"Article VII—Settlement of Disputes:

"Any disputes involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act.

* * * * *

"Article VIII—Effect of This Agreement:

"This agreement shall become effective upon ratification by all of the organizations signatory hereto except that upon such ratification the adjustments in rates of pay provided by Article IV shall be effective as of May 7, 1964, and the requirements of Section 1 of Article II with respect to the furnishing of suitable lodging or an equitable allowance in lieu thereof shall be made effective at a date no later than 30 days following such ratification.

"This agreement is in settlement of the dispute growing out of notices served by the carriers listed in Exhibit A, B and C on or about November 2, 1959, and by the organization signatory hereto on September 7, 1960, as implemented by notices of April 6, 1961, not including issues disposed of by the Award of Arbitration Board No. 282, and shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended, except that rates for miles in excess of those comprising the basic day shall remain unchanged until January 1, 1968.

> "This agreement shall be construed as a separate agreement by and on behalf of each carrier party hereto and those employees represented respectively by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, as heretofore stated; and shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended."

Superintendent's Circular No. 65, dated July 24, 1964, which the claim asserts constitutes full compliance with Section 1, Article II of the National Work Rules Agreement of June 25, 1964, was unilaterally promulgated by SP&S instead of working out on a local basis the suitable accommodations or allowance in lieu thereof as provided in the national agreement (R. 6-7, 42). Although during the period from June 25, 1964 through July 24, 1964 plaintiffs met twice with ORC&B General Chairman Delaney with respect to the subject matter of Article II of the National Work Rules Agreement of June 25, 1964, the plaintiffs refused to negotiate or give good faith consideration to any of the proposals of the ORC&B for a specification of the lodgings or allowance in lieu which would be acceptable to the employees represented by ORC&B (R. 42). Instead of bargaining in good faith SP&S insisted that it had a right to conduct a survey of the quarters used by the men when they had no allowance for lodging and treat whatever quarters the men had used under these conditions of adver-

sity as actually suitable (R. 6-7, 60-68). Superintendent's Circular No. 65 reads as follows (R. 16):

"SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY SYSTEM LINES

"Portland, Oregon
July 24, 1964

"Circular No. 65

"ALL CONCERNED:

"Effective July 25, 1964 and until further notice, whenever a road service crew is tied up at a terminal other than the designated home terminal of the crew assigned for four hours or more, each member of the crew so tied up will be provided lodging at the following locations:

Spokane—Couer d'Alane Hotel
Pasco—Pioneer Hotel
Wishram—SPS Hotel
Bend—Colonial Hotel
Albany—Albany Hotel
Eugene—Lane Hotel
Astoria—Astor Hotel
Seaside—Chillquist Rooming House
Vernonia—Hy-van Hotel

"A survey recently taken of lodging then being used by train and enginemen at the above points indicated that while some were using accommodations listed above, others had made different lodging arrangements. Therefore, although accommodations will be available at the above-named establishments, if any crew member desires to keep his present arrangement, he may do so in which event he will be allowed $1.50 for each layover period

during which he is tied up for more than four hours at the away-from-home terminal of his assignment. This allowance may be claimed on the service slip for the particular trip.

"While the above arrangement is in effect, the allowance in lieu of lodging presently being made to certain train crew members in pooled caboose territory will be removed.

"J. L. Monahan
Superintendent"

The labor dispute which SP&S has attempted to submit to the adjustment boards is whether the arrangements set forth in Superintendent's Circular No. 65 constitute suitable lodgings or an equitable allowance in lieu thereof within the meaning of Section 1, Article II of National Work Rules Agreement of June 25, 1964.. We will here mention various grounds upon which ORC&B relies in contesting jurisdiction of the adjustment boards over this claim, although these are immaterial for the purposes of our argument that the dispute submitted to the adjustment boards is completely separate and distinct so far as concerns the legal issues here involved. As to both adjustment boards the claim was not ripe for submission since there had never been handling in the usual manner on the property. Negotiations on the property are a condition precedent to adjustment board jurisdiction by reason of the provisions of Section 3, First (i) of the Railway Labor Act, 45 U.S.C. 153, First (i), which requires that all disputes "growing out of grievances or out of the interpretation or application

of agreements * * * shall be handled in the usual manner up to and including the Chief Operating Officer of the carrier designated to handle such disputes" before they become referable to an adjustment board.

SP&S-ORC&B Special Adjustment Board No. 434 clearly had no jurisdiction as it was limited to handling "pending time claims and grievances, "that is cases in existence on the date of its creation, namely October 20, 1961 (R. 40-41, 45-47) and to cases submitted by mutual agreement of the parties" (R. 40-41, 45-47). The claim here attempted to be submitted to Board No. 434 was neither pending on October 20, 1961 nor submitted by mutual agreement of SP&S and ORC&B (R. 41).

Assuming however that the claim stated in the submissions filed by SP&S with Special Board No. 434 and with the National Railroad Adjustment Board, First Division, was properly before one or the other or both of these adjustment boards, this would be completely irrelevant to the issue of the enjoining of the threatened strike. As all of the pleadings and correspondence in this case make plain, the threatened strike was to be called for the purpose of securing an amendment of existing collective bargaining agreements so as to obligate SP&S for the future to provide the accommodations or allowance requested in the Section 6 notice served by ORC&B on August 3, 1964. This notice reads as follows (R. 21):

"August 3, 1964

"Mr. N. S. Westergard,
Vice President and General Manager
Spokane, Portland and Seattle Railway Co.
1101 N. W. Hoyt Street
Portland 7, Oregon

"Dare Mr. Westergard,

"Our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu thereof. We propose that an agreement be reached in accord with Section 6 of the Railway Labor Act, which will provide that acceptable suitable lodging shall include:

"(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood or carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

"(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth mile from point where crews are required to register on and/or off duty, or suitable transportation furnished between lodgings and points of reporting for duty or going off duty. Call service will be provided by carrier.

"(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance per trip will be six dollars ($6.00) to be paid by

check separate and apart from wages and earnings.

"Please advise me promptly whether you are agreeable to these provisions, or as to a date for conference concerning this proposal, as provided by the Railway Labor Act.

"Very truly yours,

/s/ T. M. DELANEY
T. M. DELANEY
General Chairman"

This notice seeks agreement as to provisions to govern future relations. The claim which SP&S attempted to submit to the adjustment boards looks to the past—did SP&S violate the contract by providing certain lodgings or allowance in lieu thereof which were not in fact suitable or equitable? The difference between the two disputes is apparent from the fact that whether the adjustment board rules SP&S did or did not violate its contract by providing the lodgings and allowance set forth in its Superintendent's Circular No. 65, neither ruling would be at all inconsistent with ORC&B's right to attempt for the future to secure other lodgings or allowances desired by the employees it represents.

That the threatened strike was directed solely to the securing of the lodgings and allowance in lieu thereof as specified in the Section 6 notice of ORC&B dated August 3, 1964 is undisputed in the record. At no place do the plaintiffs ever even accuse defendants of threatening to strike over the Superintendent's Circular No. 65, dated July 24, 1964, the propriety of which is the

only issue which the plaintiffs have attempted to submit to the adjustment boards. The claim stated by plaintiffs to the adjustment boards is consistent and makes no mention of ORC&B's proposal of August 3, 1964. The allegations of the complaint with respect to the object of the threatened strike are as follows (A. 9):

> "By telegram dated June 3, 1965, defendant ORS&B gave notice to the National Mediation Board that it was authorizing a withdrawal from service by employees of plaintiffs on July 7, 1965, at 6:00 a.m. to enforce its position * * * as set forth in defendant ORC&B's notice to plaintiffs of August 3, 1965."
>
> "The position asserted by defendants concerning what constitutes suitable lodging and an equitable allowance in lieu thereof under the agreement of June 25, 1964, as set forth in defendant ORC&B's notice to plaintiffs of August 3, 1964, is the subject matter of the controversy between defendants and plaintiffs, the object of defendants' threatened strike action, * * *"

The telegram of ORC&B dated June 2, 1965 notifying the National Mediation Board of the threatened strike likewise made no mention of the Superintendent's Circular No. 65 dated July 24, 1964 but limited the object of the strike to the Section 6 notice of the ORC&B dated August 3, 1964. This telegram stated the object of the strike as (R. 113):

> "Account of Carriers refusal to bargain realistically on our Section 6 notice of August 3, 1964"

From the foregoing it is evident the threatened strike

involved a labor dispute which had not been submitted to the National Railroad Adjustment Board. Even if the threatened strike were over a minor dispute which could be properly referred to an adjustment board, so long as it had not in fact been referred, the Norris-LaGuardia Act bars an injunction to enjoin the strike. *Manion* v. *Kansas City Terminal Ry. Co.,* 353 U.S. 927; *Brotherhood of Locomotive Engineers* v. *L. & N.R. Co.,* 373 U.S. 33, 39-40, n. 11.

Nor can a carrier confer jurisdiction on the federal courts to enjoin a threatened strike over a major dispute by submitting any or all of the dispute to the National Railroad Adjustment Board. *Missouri-Illinois R. Co.* v. *Order of Railway Conductors,* 8th Cir., 1963, 322 F.2d 793, 797. That case, parallelling the instant case, involved the attempt of the carrier to raise issues as to the applicability of a national agreement to bar a strike over a local effort to bargain. In that case, as here, the issue of the interpretation of the national agreement was submitted to the Adjustment Board. The district court and the court of appeals ruled that the Norris-La Guardia Act barred an injunction even though there were pending before the National Railroad Adjustment Board questions as to the interpretation of the national agreement relating to the right to bargain about new terms. The relevant facts in that case were stated by the Court as follows (322 F.2d 793, 794-95):

> "The local dispute began in July of 1961, while the national dispute was still in progress. Appellee served Section 6 notices under the Railway Labor Act (45 U.S.C.A. 156) requesting increases in rates

of pay, to be effective August 20, 1961 for brakemen, and August 20, 1961 for conductors, on work assignments paid for on an hourly basis. * * * Plaintiff, * * * claimed that the requests of defendant unions were barred by a provision of the 1960 mediation agreement which fixed rates of pay until November 1, 1961. It also urged that under the national moratorium agreement and local bargaining agreement all brakemen and conductor assignments are paid on a mileage rather than on an hourly basis; and therefore, defendants were requesting rates of pay for job assignments which did not exist. * * *

"* * * On August 20, 1962, the ORC&B notified the plaintiff of its intention to strike the following Monday, and a similar notice was sent plaintiff by the B of RT. On August 24, 1962, plaintiff filed these actions, asking the District Court to enjoin the threatened strike. Subsequent thereto, on August 27, 1962, plaintiff submitted to the National Railroad Adjustment Board, pursuant to Section Three, First (i) of the Act (45 U.S.C.A. 153, First (i)) the following questions, as reflected in appellant's brief:

" '(a) Did Article IV of Agreement dated June 4, 1960, known as Mediation Agreement Case A-6081 and Article VI of Agreement dated June 22, 1960, known as Mediation Agreement Case A-6614, prohibit the serving of notice for increase in rates of pay for conductors effective August 20, 1961, and for brakemen effective August 26, 1961?

" '(b) Does the Basic Agreement of December 1, 1956, applicable to conductors and the Basic Agreement of August 1, 1956, applicable to brakemen, make provision for conductor and brakemen

assignments to be paid on an hourly basis?'

"Thereafter, on August 29, 1962, plaintiff amended its complaint to reflect its submission of the dispute to the Adjustment Board and alleged that defendants were unlawfully attempting to enforce their own interpretation of existing agreements by means of a strike when such dispute had been submitted to the Adjustment Board."

It will be noticed that there as here, the carrier accused the employees of attempting to enforce "their own interpretation" of the existing agreements by means of a strike. The court distinguished between the issue of interpretation which was submitted to the Adjustment Board and the effort to obtain new terms which was a different labor dispute (322 F.2d at p. 797).

B.

**The labor dispute with respect to which ORC&B threatened to strike is a major dispute.**

The ORC&B is making no contention that its members have any right under existing agreements to an air conditioned room, a new Simmons 400 mattress or calls from the carrier to wake and send them on their way or any of the other terms proposed by its Section 6 Notice dated August 3, 1964 (R. 21). Rather these are admittedly new terms proposed as the basis for an agreement to be effective in the future. The reference to Section 6 of the Railway Labor Act in the notice of August 3, 1964 (R. 21) leaves no ambiguity. Sections 6 of the Railway Labor Act, 45 U.S.C. 156, provides:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Here at the time of the threatened strike more than ten days had elapsed after the termination of conferences, the carriers had not requested the services of the Mediation Board and the Mediation Board had not proffered its services. Hence, the employees were entirely free to strike.

This Court in the case of *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of Locomotive Firemen and Enginemen,* 9th Cir., 268 F.2d 54, certiorari denied, 361 U.S. 864, carefully and accurately quoted and applied the applicable authorities distinguishing a major and a minor

dispute. This Court there stated (268 F.2d at pp. 55, 58-59):

> "The principal questions presented here involve aspects of the Railway Labor Act, 45 U.S. C.A., sec. 151 et seq. They are: (1) Whether the controversy was a major or minor dispute under that act; * * *"

> "At the outset it is necessary to note the distinction between so-called major and minor disputes under the Railway Labor Act. In *Elgin, Joliet & Eastern Railway Co.* v. *Burley,* 325 U.S. 711, 723, 65 S. Ct. 1282, 1290, 88 L. Ed. 1886, the difference between these two kinds was explained as follows:

> " 'The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

> " 'The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement. * * *'

> "As to both kinds of dispute, the act requires

that the parties enter into negotiation as the first step towards settlement of the controversy. Where negotiation fails, the procedures diverge. Major disputes go first to mediation before the National Mediation Board; if that fails, then to acceptance or rejection of arbitration; and finally to possible presidential intervention. If all this fails, compulsory processes are at an end, and either party may resort to helf-help. *Elgin, Joliet & Eastern Railway Co.* v. *Burley, supra,* 325 U.S. at 65 S. Ct. at page 1290, page 725. The Norris-La Guardia Act prohibits the issuance of an injunction in a railway labor case involving a "major dispute.' *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.,* 353 U.S. 30, 42, 77 S. Ct. 635, 1 L. Ed. 622.

> "In the case of minor disputes, if negotiation fails either party may submit the matter to appropriate division of the National Railroad Adjustment Board."

In *Order of Railroad Telegraphers* v. *Chicago N.W. R. Co.,* 362 U.S. 330, 336, the Supreme Court stated:

> "Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement."

The Supreme Court summarily rejected the carrier's contention that a minor dispute was involved, stating (362 U.S. at p. 341):

> "Only a word need be said about the railroad's contention that the dispute here with the union was a minor one relating to the interpretation of this contract and therefore one that the Railway Labor

Act requires to be heard by the National Railroad Adjustment Board. We have held that a strike over a 'minor dispute' may be enjoined in order to enforce compliance with the Railway Labor Act's requirement that minor disputes be heard by the Adjustment Board. *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.,* 353 U.S. 30. But it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement rather than to mere infractions or interpretations of the provisions of that agreement. Particularly since the collective bargaining agreement which the union sought to change was a result of mediation under the Railway Labor Act, this is the type of major dispute that is not governed by the Adjustment Board."

To the same effect see *Missouri-Illinois R. Co.* v. *Order of Railway Conductors,* 8th Cir., 1963, 322 F.2d 793, 796-797, heretofore discussed at length in Point I, Subjoint A, *supra.* The Court there stated 322 F.2d at pp. 795, 797:

"The case was heard before the United States District Court for the Eastern District of Missouri, on October 1, 1962.

"At that time, plaintiff reiterated its reasons for believing that the unions' demands were improper. It argued, as stated, that the demands were in violation of the moratorium provisions of the national mediation agreement; and that the rates of pay requested were for job assignments that did not exist, as the entire subject of rates of pay for existing jobs was already a matter of present agreement be-

tween the parties. Hence, it contended that the dispute involved here was a 'minor' one and thereby within the exclusive jurisdiction of the Adjustment Board.

* * * * *

"That the dispute in the case at bar involves a proposed change in rates of pay for the plaintiff's employees engaged in 'road-switching' is apparent from appellant's complaint, where it is alleged that the 'request for a change (was) in rates of pay related to conductor assignments which are paid on an hourly basis as set out in (the National) Mediation cases . . .' Notwithstanding, appellant would have us rule that although such a request began as a major dispute, it later developed into a minor one as a result of the differences between the parties concerning the interpretation of the 1960 National Mediation Agreement governing the fixing of rates of pay, etc. Thus, it says, as the dispute centers about the 'interpretation or application of agreements concerning rates of pay, rules, or working conditions,' it is therefore a minor dispute submittable to the Adjustment Board. (45 U.S.C.A. 153 First (i)).

* * * * *

"That a dispute over wage rates, though based on a previously existing agreement between the parties, is the type of dispute Congress intended to leave to non-compulsory arbitration, is made manifest in *Elgin J & E R. Co.* v. *Burley, supra.* Merely because the dispute may be related to a change in an existing agreement that had not yet terminated does not, *a fortiorari,* make the dispute a minor one."

The National Mediation Board has ruled that similar requests by labor organizations for local agreements specifying in more detail suitable lodging or an equitable allowance in lieu thereof pursuant to the yardstick for bargaining contained in Section 1 of Article II of the National Work Rules Agreement of June 25, 1964, constitute proper Section 6 notices. See for instances the notice served by the ORC&B on the Denver & Rio Grande Western Railroad Company on August 14, 1964, a copy of which is printed as Appendix B to this brief, pp. 35-36, infra, the protest of the carrier thereto dated August 21, 1964, a copy of which is printed as Appendix C to this brief, pp. 37-38, *infra,* and the ruling of the National Mediation Board dated July 29, 1965, that "Notice of August 14, 1964 served by the ORC&B * * * is a proper notice served in accordance with Aection 6 of the Railway Labor Act," a copy of which ruling is printed as Appendix D to this brief, pp. 39-40, *infra.*

The ORC&B and the BRT each served a similar notice on the L & N Railway on September 14, 1964, copies of which are printed as Appendix E and Appendix F to this brief, pp. 43-44, *infra,* the National Mediation Board on April 14, 1965 ruled these were proper Section 6 notices, a copy of which ruling is printed as Appendix G to this brief, pp. 45-46, *infra,* and the L & N and the BRT thereafter on July 6, 1965 reached an agreement in settlement of their dispute, a copy of which is printed as Appendix H to this brief, pp. 47-55, *infra.*

Thus both by its intrinsic nature and by rulings of

the National Mediation Board on almost identical notices, the notice of August 3, 1964 served by ORC&B on the SP&S must be held a proper Section 6 notice. As a consequence a strike in support thereof constitutes a major dispute and the federal courts are without jurisdiction to enjoin the strike.

C.

**The labor dispute with respect to which the ORC&B threatened to strike is not properly enjoinable even if it is a minor dispute because it has never been submitted to an adjustment board.**

The federal courts are equally without jurisdiction to enjoin a strike in a minor dispute as in a major dispute, unless the minor dispute is pending before an adjustment board. *Manion* v. *Kansas City Terminal R. Co.,* 3353 U.S. 929; *Brotherhood of Locomotive Engineers* v. *L. & N. R. Co.,* 373 U.S. 33, 39-40, n. 11.

The strike here was in support of the demands made in the ORC&B's letter of August 3, 1964. Assuming these demands by some stretch of the imagination can be construed as an effort to achieve a preferred construction of the terms suitable lodging and equitable allowance contained in the June 25, 1964 National Work Rules Agreement, admittedly the issue of whether the lodgings and allowance specified in the August 3, 1964 letter are suitable and equitable within the meaning of the June 25, 1964 agreement, has not been submitted to any adjustment board. Hence the Norris-LaGuardia Act, 29 U.S.C.

101 et seq., is applicable and deprives the federal courts of jurisdiction to enjoin the strike.

If the strike could by any stretch of the imagination be said to be against a holding that accommodations and allowances specified in the Superintendent's Circular No. 65 were suitable and equitable, the failure to handle this Circular by negotiation on the property in accordance with established practice up to the highest carrier operating officer designated to handle such disputes as required by Section 3 (First, (i) of the Railway Labor Act, 45 U.S.C. 153, First (1), deprives the adjustment boards of jurisdiction. Therefore even this claim is not properly pending before an adjustment board and the Norris-LaGuardia Act, 29 U.S.C. 101, et seq., bars an injunction.

D.

**Even if it be held that the threatened strike relates to the labor dispute which has been submitted to the adjustment board, since the threatened strike is over a major dispute the submission to the adjustment board does not endow the court with jurisdiction to enjoin the strike.**

While we believe that we have thoroughly demonstrated that the threatened strike involves a labor dispute wholly separate and distinct from the labor dispute which SP&S has attempted to submit to an adjustment board, even if the disputes are related, since the threatened strike is directed to the achievement of an amendment of the contract to fix the specific details

of the lodgings or allowance in lieu thereof for the future, the strike involves a major dispute and may not be enjoined. The holding of the United States Court of Appeals for the Eighth Circuit in the case of *Missouri-Illinois R. Co.* v. *Order of Railway Conductors,* 322 F.2d 793, constitutes a sound and well reasoned ruling that the presence in a dispute of issues of interpretation for an adjustment board does not deprive the efforts of a union to achieve an amendment of a contract looking to the future of its character of a major dispute.

In the *Missouri-Illinois* case, as here, the carrier refused to negotiate with respect to a local Section 6 notice on the ground that a national agreement properly construed barred the requested charges. There the carrier submitted to an adjustment board its contention that the national agreement barred the local Section 6 notice. Here no such issue has been submitted to the adjustment board. Thus the interrelationship of the Sectoin 6 notice to the adjustment board dispute was much closer in the *Missouri-Illinois* case than in the instant case. Nevertheless the Eighth Circuit held that no injunction could issue.

Upon both reason and authority we respectfully submit that no aspect of the claim before the adjustment boards, even assuming the claim has been properly submitted, deprives the efforts of the ORC&B to achieve an agreement for the future providing for the lodging and allowance specified in its August 3, 1964 notice of its basic character as a major dispute. Once it is recognized that this effort had the character of a major dispute, the

courts' lack jurisdiction to enjoin these efforts is beyond dispute.

II

**Under the provisions of Section 7 of the Norris-La Guardia Act, 29 U.S.C. 107, the ORC&B is entitled to attorney's fes and expenses upon its successful defeasance of a suit for injunction.**

We respectfully request that upon the reversal of the injunction below the ORC&B be awarded attorney's fees and the expense of this suit. Section 7 of the Norris-LaGuardia Act, 29 U.S.C. 107 authorizes such an award. *Elgin Joliet & E. Ry Co.* v. *Brotherhood of Railroad Trainmen,* 7th Cir., 1962, 302 F.2d 540, 545.

## CONCLUSION

For the foregoing reasons it is respectfully urged that the temporary injunction issued below be reversed with an award to the ORC&B of attorney's fees and expenses of this litigation.

Clifford D. O'Brien
514 Corbett Building
Portland, Oregon 97204

Harry J. Wilmarth
Merchants National Bank Building
Cedar Rapids, Iowa

Attorneys for Appellants

October 1, 1965

## CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLIFFORD D. O'BRIEN

## APPENDIX A

List of Exhibits, all of which were identified, offered and received in evidence at Tr. 5-6.

Plaintiff's Exhibits:

No. 1 Carriers' & Organizations' Notices of 1959 and 1960

No. 2 Agreementof 11-17-60

No. 3 Report of the Presidential Railroad Commission

No. 4 Mediation Document of 4-21-64

No. 5 Statement and Determination of the Mediators, 5-7-64

No. 6 Agreement of 7-25-64

No. 7 Agreement Establishing Board Number 434

No. 8 Delaney Letter to Westergard of 8-10-64

No. 9 Westergard Reply to Delaney of 10 August '64

No. 10 Circular No. 65

No. 11 September 15, 1964 Status Quo Agreement

No. 12 Letter from Delaney to Westergard 12-7-64

No. 13 5-23-52, National Pooled Caboose Agreement

No. 14 4-10-58, Pooled Caboose Agreement S.P.& S.-ORC&B

No. 15 S.P.& S. Letter to Douglass, 6-23-65, and attachment

No. 16 Delaney to Westergard 11-10-64

No. 17 Westergard Reply to Delaney 11-23-64

No. 18 Letter from the Three Organizations 7-23-64

No. 19 Agreement of November 25 and 27 between S.P.&S. and B. of L.F.&E. and B. of L.E., were received in evidence

Defendant's Exhibits:

No. 1 L & N Notice by ORC & B of 9-14-64

No. 2 National Mediation Board Letter of 4-14-65 to L. & N.

No. 3 Harris Telegram to Delaney, 9-15-64

No. 4 Wolfe Letter to Ganser, 11-12-64

No. 5 Wolfe Letter to Organization Presidents of 4-30-65

No. 6 Unidentified Letter of 5-13-64 to Wolfe

## APPENDIX B

GENERAL COMMITTEE OF ADJUSTMENT

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN

Denver and Rio Grande Western Railroad Co.
Colorado and Southern Railway Co.
Utah Railway Co.

W. D. Hopkins
General Chairman
August 14, 1964

Mr. R. D. Wolfe, Assistant to Vice-President
The Colorado and Southern Railway Company
Denver, Colorado

Re: 13-X - June 25, 1964 Agreement
Section 1 of Article II

Dear Sir:

Our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu of the Railway Labor Act, which will provide that acceptable suitable lodging shall incude:

(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood or carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth mile from point where crews are required to register on and/or off duty, or suitable transportation furnished between lodging and points of reporting for duty, or going off duty. Call service will be provided by carrier.

(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance per trip will be six dollars ($6.00) to be paid by check separate and apart from wages and earnings.

Please advise me promptly whether you are agreeable to these provisions, or as to a date for conference concerning this proposal, as provided by the Railway Labor Act.

Yours truly
W. D. Hopkins
General Chairman

cc:
G. H. Harris
D. G. Hoskins
J. C. Farrell

## APPENDIX C

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

P. O. Box 5482
Denver, 17, Colorado
Personnel Department

August 21, 1964

NRLC-6

Mr. W. D. Hopkins
General Chairman, ORC&B
Denver, Colorado

Dear Sir:

Regarding your purported Section 6 notice dated August 14, 1964, of desire to enter into an agreement providing for suitable lodging at away-from-home terminals.

The notice is improper and in fact involves the application of Article II of the Operating Employees' Agreement of June 25, 1964.

Your specific attention is directed to Article VII of the June 25, 1964 Agreement reading—

> "Any dispute involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other provisions of Section 3 of the Railway Labor Act."

which makes the so-called Section 6 notice not only improper but a specific violation of the Agreement.

Further attention is directed to that part of Item 4, page 4, of the "Settlement and Determination of the Mediators" regarding the Agreement wherein it is said by Mediators that—

> "We note, however, that this is a negotiated Agreement voluntarily entered into and therefore is a responsibility on the Parties in respect to their own interest and that of the Public view the Agreement as having established a relationship as concerns the issues included for at least the ensuing two years."

which is evidence that a notice such as yours will continue to be improper for the two-year period to which the Mediators refer. However, if you so desire, I will be agreeable to meeting with you September 15, 1964 at 10:00 A.M., Room 301, Rio Grande Building, 1531 Stout Street, Denver, Colorado, for the purpose of more fully explaining Carrier's position to you.

Yours truly,

E. B. HERDMAN
Director of Personnel

## APPENDIX D

NATIONAL MEDIATION BOARD
Washington

July 29, 1965

NMB Case No. A-7477

Mr. E. B. Herdman, Director of Personnel
The Denver & Rio Grande Western Railroad Co.
Denver, Colorado 80217

Mr. G. H. Harris, President
Order of Railway Conductors & Brakemen
Cedar Rapids, Iowa 52401

Mr. P. S. Heath, Grand Chief Engineer
Brotherhood of Locomotive Engineers
1118 BLE Building
1365 Ontario Avenue
Cleveland, Ohio 44114

Gentlemen:

Reference is made to NMB Case No. E-298.

This Board was advised, on April 30, 1965, that the Order of Railway Conductors and Brakemen had authorized the peaceful withdrawal from service of employees represented by that organization on the Denver and Rio Grande Western Railroad Company at 6:00 a.m. that date. The organization advised that this withdrawal was due to the failure of the carrier to bargain concerning the employee's notice of August 14, 1964 relative to suitable lodging.

On April 30, 1965 the Board assigned NMB Case No. E-298 to this dispute and requested the organization to defer the proposed strike action.

The organization complied with this request. On May 27, 1965 the Brotherhood of Locomotive Engineers requested they be made a party to this case on the basis of a similar unresolved dispute with the carrier. Brotherhood of Locomotive Engineers was made a party to NMB Case E-298 and all parties were so advised.

Mediator Luther G. Wyatt was assigned to this case and commenced handling in Denver on July 12, 1965.

The Board has now had an opportunity to review this file and the notice of August 14, 1964 served by the ORC&B. On the basis of this review the Board has reached the conclusion that this is a proper notice served in accordance with Section 6 of the Railway Labor Act. Therefore, you are advised that NMB Case No. E-298 has been converted and docketed as NMB Case No. A-7477 and will be handled accordingly.

Very truly yours,

THOMAS A. TRACY
Executive Secretary

## APPENDIX E

ORDER OF RAILWAY CONDUCTORS
& BRAKEMEN

GENERAL COMMITTEE OF ADJUSTMENTS
LOUISVILLE & NASHVILLE RAILWAY
802 HOFFMAN BUILDING
LOUISVILLE, KENTUCKY

September 14, 1964

Mr. W. S. Scholl,
Director of Personnel,
Louisville & Nashville R. R. Co.,
908 West Broadway,
Louisville 1, Kentucky.

Dear Sir:

This has reference to Article II, Section I of National Agreement dated June 25, 1964. The issue of suitable lodging or an equitable allowance in lieu thereof was remanded to the local property for negotiations. Numerous conferences have been held on the subject matter but to date, have failed to produce an agreement as to the type, quality or location of suitable lodging or an equitable allowance in lieu thereof.

Pursuant to Section 6 of the Railway Act, please accept this Notice, effective thirty (30) days hereafter, to amend the existing Agreement covering crafts and classes of employees represented by the Order of Railway Conductors and Brakemen on the Louisville & Nashville Railroad (L. & N.—N.C. & St. L. Districts), which will provide that acceptable suitable lodging shall include:

(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood floor of carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth mile from point where crews are required to register on and/or off duty, or suitable transportation furnished between lodging and points of reporting for duty, or going off duty. Call Service will be provided by carrier.

(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance per trip will be six dollars ($6.00) to be paid by check separate and apart from wages and earnings.

Please advise me promptly whether you are agreeable to these provisions, or as to a date for conference concerning this proposal, as provided by the Railway Labor Act.

Yours truly,

D. S. PANNELL,
General Chairman,
Order of Railway Conductors
and Brakemen.

## APPENDIX F

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN

L. & N.. Railroad (N. C. & St. L. District)

September 28, 1964

Mr. W. S. Scholl
Director of Personnel
L&N Railroad Company
908 West Broadway
Louisville 1, Kentucky

Dear Sir:

In accordance with the provisions of Section 6 of the Railway Labor Act, you are hereby advised of our desire to amend the National Agreement dated June 25, 1964, Article 2, Section 1, for employees represented by the Brotherhood of Railroad Trainmen on the N.C. & St. L. District.

(I) The amendment to read: When the carrier ties up a road crew or individual members thereof at a terminal, including any point that a work, wreck, (regular or extra) circus train, pool or regular assigned is tied up for any reason, other than their designated home terminal for 4 hours or more, the crew members so tied up will be provided suitable lodging at the carrier's expense, or an equitable allowance in lieu thereof.

(II) Suitable lodging shall be: Single room, air conditioned, suitable furniture in each room, bath facilities in room, rooms to be

maintained in a suitable manner with change of linen after each use.

(III) The lodging in Paragraph (II) to be located not more than one-fourth mile from point of going on and/or off duty, or transportation shall be furnished between points of lodging and reporting and going off duty. Call service shall be provided by the carrier.

(IV) In lieu of lodging in the above paragraphs, an equitable allowance of six dollars ($6.00) shall be paid each member of crews that are tied up in accordance with paragraph (I) above.

Please advise time and date that we may have a conference on the above.

Yours very truly,

O. B. GENTRY
General Chairman, BRT

Copy: Mr. C. Luna, Pres., BRT

## APPENDIX G

NATIONAL MEDIATION BOARD
Washington
April 14, 1965
Case A-7397 (Formerly E-291)

Mr. W. S. Scholl, Director of Personnel
Louisville & Nashville Railroad Company
908 West Broadway
Louisville, Kentucky

Mr. G. H. Harris, President
Order of Railway Conductors & Brakemen
Cedar Rapids, Iowa

Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland, Ohio

Gentlemen:

Reference is made to NMB Case No. E-291. On March 8, 1965 the Board was advised by the Order of Railway Conductors & Brakemen that a peaceful withdrawal from service of employees represented by that organization would take place on the Louisville & Nashville Railroad at 6 A.M., Wednesday, March 10, 1965. The organization advised this withdrawal was due to the failure of the carrier to bargain concerning the employees notice of September 14, 1964 relative to suitable lodging.

The Board, on March 9, 1965, assigned NMB Case No. E-291 to this dispute and requested the organization to defer proposed strike action. The organization complied with this request. On March

31, 1965 the Brotherhood of Railroad Trainmen requested that they be made a party to this case on the basis of notices involving the question of suitable lodging served as follows: September 18, 1964 (L&N) and September 28, 1964 (NYC&STL). On the basis of this request all parties were advised that the BRT would be made a party to NMB Case No. E-291. Mediator J. Earl Newlin was assigned to this case and commenced handling in Louisville March 18, 1965.

The Board has now had an opportunity to review this file and the notices of September 14, 1965 served by the ORC&B and the notices of September 18 and 28, 1964 served by the BRT. On the basis of this review the Board has reached the conclusion that these are proper notices served in accordance with Section 6 of the Railway Labor Act. Therefore, you are advised NMB Case No. E-291 has been converted and docketed as NMB Case No. A-7397, and will be handled accordingly.

Very truly yours,

THOMAS A. TRACY
Executive Secretary

4-ctm
cc-to: J. E. Newlin

## APPENDIX H

Agreement made this 6th day of July, 1965, by and between the Louisville and Nashville Railroad Company and its Trainmen on the L&N District, represented by the Brotherhood of Railroad Trainmen.

PREAMBLE:

The Louisville and Nashville Railroad Company and its Trainmen are parties to the National Agreement of June 25, 1964, Article II of which reads as follows:

"ARTICLE II—EXPENSES AWAY FROM HOME

"Section 1 —

"When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (including tie-up points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.

"If an allowance is being made in lieu of lodging as well as other considerations under

provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

"The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement.

"Section 2 —

"When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (as defined in Section 1 of this Article II) other than the designated home terminal for four (4) hours or more, each member of the crew so tied up shall receive a meal allowance of $1.50.

"NOTE: For the purpose of Sections 1 and 2 of this Article II, extra board employees shall be provided with lodgings and meal allowance in accordance with the rule governing the granting of such allowance to the crew they join; that is, the designated home terminal will be the designated terminal of the crew assignment."

IT IS AGREED:

1. Suitable lodging for trainmen qualified therefor under Article II, Section 1, of the National Agreement of June 25, 1964, will be provided at points and establishments mutually satisfactory to the Director of Personnel of the carrier and the Gen-

eral Chairman of the Brotherhood of Railroad Trainmen, at the carrier's expense.

2. The term "suitable lodging" is defined to mean sanitary rooms, one man to a room. Each room shall be equipped with a comfortable bed. Bathing facilities, with hot and cold running water, and toilet will be readily available to the occupants of these rooms on the same floor. Blankets and clean linen (sheets and pillow cases) and soap and towels will be supplied for each occupant. Periods of occupancy, during layover periods while available for call, will not be limited. Rooms wil be cleaned and bed linen changed after each occupancy by personnel other than trainmen. Rooms shall be cooled or heated when climatic conditions normally require such cooling or heating.

3. If a lodging facility provided in accordance with Section 1 hereof becomes unsatisfactory to either party to this agreement and correction is not feasible, designation of the facility will be cancelled and the parties will proceed again in accordance with Section 1 hereof.

4. The parties will proceed promptly to fulfill their obligations under the foregoing provisions of this agreement. In the event a road service trainman (except short turnaround passenger trainman) is tied up four (4) hours or more at a terminal or tie-up point described in Article II of the National Agreement of June 25, 1964, at which it has not been reasonably possible to provide suitable lodging, an equitable allowance in lieu of lodging, in the amount of $2.00, will be allowed for each such tie-up. However, if the trainman is tied up for more than 24 hours an additional allowance of $2.00 will be made.

5. If a trainman is tied up four (4) hours or more at a terminal or tie-up point as described in Article II of the National Agreement of June 25, 1964, but the designated facility at which suitable lodging has been provided in accordance with Section 1 hereof has no room available and arrangements have not been made elsewhere for overflow, the trainman, if qualified to receive suitable lodging, will be allowed an equitable allowance of $2.00 or actual lodging expense, whichever is the greater. Claim for the actual lodging expense will be supported by receipt.

6. A trainman in interdivisional service, the designated home terminal of which is off of his seniority district, but who lives at or in the vicinity of the away-from-home terminal of his assignment, will be allowed $2.00 in lieu of lodging for each tie-up of four (4) hours or more at the away-from-home terminal of his assignment.

7. In cases where lodging facilities are not provided, trainmen in work train and wrecker service tied up on line of road or at terminals other than the division home terminal for four (4) hours or more and thainmen tied up on line of road under the Hours of Service Law for four (4) hours or more will be paid a monetary allowance of $2.00 in lieu of lodging for each such tie-up, provided, however, if the trainman is tied up for more than twenty-four (24) hours, an additional $2.00 allowance will be made. They will not be tied up between their terminals except at points where food and lodging can be procured.

8. If a trainman is called for duty prior to having been tied up for four (4) hours or more and for

any reason the train does not depart until more than one hour after the on-duty time, the four hours will be computed to extend to 30 minutes prior to actual departure time from the terminal.

EXAMPLE 1: A trainman tied up at 4:00 p.m. He is called on duty at 7:45 p.m. The train does not depart until 9:15 p.m. The trainman would be considered tied up from 4:00 p.m. to 8:45 p.m. and would be allowed a meal allowance and also the equitable allowance in lieu of lodging, but in no event will he be entitled to both lodging and the lodging allowance.

EXAMPLE 2. The trainman in the foregoing example departs at 8:45 p.m. He would not be entitled to meal allowance nor allowance in lieu of lodging.

9. Where lodging is provided or an equitable allowance in lieu of lodging is paid in accordance with their agreement, trainmen will not use cabooses as places of lodging. Exception: Trainmen tied up on line of road as referred to in Section 7 of this agreement may use the caboose as a lodging place if other lodging is not provided by the company.

10. Paragraph 3 of Article 29 of the L&N District Trainmen's schedule agreement is revised to read:

"Where cabooses are not pooled, they will be placed on caboose track or other track convenient to supplies before the assigned crew re-

ports for duty and they will be left there until the assigned crew has had an opportunity to obtain supplies, and such cabooses will not be switched with at terminals nor will trains be built on such cabooses."

11. In the event the carrier constructs and operates or arranges for the construction and/or operation of lodging facilities in accordance with specifications hereunder set forth at one or more points on its system for the accommodation of train and engine service employees qualifying for lodging under the provisions of Article II, Section 1, of the National Agreement of June 25, 1964, the foregoing provisions of this agreement relating to the furnishing of suitable lodging or an equitable allowance in lieu thereof shall cease to apply at such point or points when such facilities are placed in service.

## SPECIFICATIONS

1. Single occupancy rooms.
2. Adequate lighting and ventilation, including a window in each sleeping room.
3. Controlled heat in winter and air-conditioning in summer.
4. Easy access to toilet and bath facilities on the same floor.
5. Towels, soap and toilet tissue furnished.
6. Cooled drinking water.
7. Hot and cold water.
8. Twin-size bed with box springs, mattress and blankets.
9. Linen changed after each occupancy.

10. Room dimensions to be not less than 8 ft. by 9 ft. by 8 ft. high.

11. Room to be equipped with comfortable chair, night stand and clothes rack.

12. Lounge, including comfortable chairs, writing tables and lamps.

13. Surface of floor to be other than concrete.

14. Adequate kitchen facilities where restaurant is not located within one-half mile of lodging.

15. Facilities will be maintained in a clean and sanitary condition by other than trainmen, except trainmen using kitchen facilities will restore them to the condition in which they found them.

12. In instances where the distance from the off-duty point to the lodging facility provided by the carrier in accordance with the terms of this agreement, or from such lodging facility to the on-duty point, is one mile or more, the carrier will provide transportation without cost to the trainmen. Except as provided hereinafter, such transportation will be in automotive passenger vehicles and will be made available within 30 minutes after time of relief from duty. When it becomes known that the vehicle normally used for transportation will not be available within the specified 30 minutes, the carrier's representative will arrange for taxi service provided the taxi can be made available before the vehicle normally used. In instances where the distance from the off-duty point to the nearest public bus line stop, or from the nearest public bus line stop to the on-duty point, as the case may be, is not more than

one-fourth mile and the distance between the lodging facility and the nearest public bus line stop is not more than one-fourth mile, trainmen entitled to transportation at the company's expense will, when directed by the carrier, use public bus transportation during such hours as the public bus schedules are not more than 30 minutes apart, and in that event they will pay the bus fare and it will be reimbursed to them by the carrier. Such bus service will constitute satisfactory transportation under this Section. The distances referred to in this Section are to be computed via the route a pedestrian would normally travel.

13. Add a paragraph to Article 6 of the L&N District Trainmen's Schedule Agreement reading:

> "The time of trainmen in freight service will be computed to the time the last member of the train crew is relieved from duty, regardless whether the crew member last relieved is the conductor, flagman or brakeman. (Such time will also be used in computing final terminal delay, if any accrues, which will, of course, be computed on the basis of the actual mileage paid, beginning at designated governing point.)"

14. This agreement is in full and final settlement of the dispute concerning the meaning and application of Section 1 of Article II of the National Agreement of June 25, 1964, and growing out of the trainmen's notice of September 18, 1964, on the subject of suitable lodging.

15. This agreement shall become effective August 1, 1965, and shall continue in effect until changed or modified in accordance with the provis-

ions of Section 6 of the Railway Labor Act, as amended.

Signed at Louisville, Kentucky, this 6th day of July, 1965.

FOR THE EMPLOYEES CONCERNED:

/s/ J. M. HICKS
General Chairman, B.R.T.
L&N District

APPROVED:
/s/ I. M. KING
Vice President, B.R.T.

FOR THE LOUISVILLE AND NASHVILLE
RAILROAD COMPANY:
/s/ W. S. SCHOLL
Director of Personnel